Supreme Court, U.S.
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No. 96

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

EDWIN KING, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED
Petitioner

v.

AMERICAN CIVIL LIBERTIES UNION
OF MISSISSIPPI, INC., ET AL
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED

v.

KIRK FORDICE, GOVERNOR, ET AL
Respondents

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the procedure ordered by the District Court to open for public inspection certain files and records containing information illegally gathered and collected by the Mississippi State Sovereignty Commission as a result of government spying, surveillance and warrantless searches constitutes a violation of the constitutional right to privacy of those persons identified in the files where the files contain information concerning the most intimate aspects of their personal and professional lives.

PARTIES TO THE PROCEEDING

The Petitioner, Edwin King, individually and on behalf of all others similarly situated, is a plaintiff. The America Civil Liberties Union of Mississippi, Inc. (ACLU), et al are also plaintiffs. Petitioner represents a subclass of plaintiffs designated as "privacy plaintiffs". The Respondent, ACLU, et al, represents a subclass of plaintiffs designated as the "disclosure plaintiffs". The Respondent Kirk Fordice is sued in his capacity as Governor of Mississippi.

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KIRK FORDICE, GOVERNOR, ET AL
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Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

This appeal involves important issues concerning the privacy rights of persons who were subject to illegal surveillance, spying and warrantless

searches undertaken by the State of Mississippi during the 1950's and 60's under the aegis of the Mississippi State Sovereignty Commission (the "Commission"). For many years, the State of Mississippi, acting through the Commission, illegally spied on and collected sensitive personal information about citizens who were engaged in desegregation efforts. The purpose was to promote and secure state sponsored policies of racial segregation by using the information obtained to harass, threaten, intimidate or discredit these citizens and their friends or associates. Information gathered by the Commission was collected and maintained in certain files and records. These files and records are now in the possession of the Mississippi Department of Archives and History. The District Court and the Court of Appeals have ordered the public release of these files and records. The method and manner of the release of these files to the public is the subject of this proceeding. The issue is whether the procedure designated by the District Court does not safeguard privacy rights and thus constitutes a violation of a constitutional guarantee.

OPINIONS BELOW

This case was appealed to the United States Court of Appeals for the Fifth Circuit three (3) times. The initial appeal is reported as American Civil Liberties Union of Mississippi, Inc., et al v. Finch, et al, 638 F.2d 1336 (5th Cir. 1981). The Fifth Circuit rejected the argument of the State of Mississippi that files prepared, compiled and maintained by the Commission should remain under seal on the basis of privilege. Upon remand, the District Court held in ACLU v. Mabus, 719 F.Supp. 1345 (S.D.Miss. 1989) that the files and records of the Commission should be completely opened for public inspection with no privacy protections or safeguards.

The second appeal is reported as ACLU v. Mississippi, 911 F.2d 1066, reh. denied 919 F.2d 735 (5th Cir. 1990). The Fifth Circuit reversed the Order of the District Court to completely open the files with no privacy safeguards and remanded the case to the District Court with directions to consider the constitutionally protected rights of privacy asserted by the subclass of "privacy plaintiffs". The District Court entered a Memorandum Opinion and Order on May 31, 1994 (Pet. App. 5a) which is not reported. In this Opinion and Order the District Court fashioned a procedure for disclosure of the files.

In the final appeal, ACLU, et al v. King, No. 94-60425 (5th Cir. June 11, 1996) (Pet. App. 1a) the Fifth Circuit held that the disclosure procedure ordered by the District Court to open the files with certain limited privacy safeguards did not constitute an abuse of discretion.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 11, 1996. (Pet. App. 1a) Petitioner here did not file Petition for Rehearing, and the mandate issued. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL ISSUE INVOLVED

This case involves the constitutional right of personal privacy, a right which this Court has often declared to be guaranteed by the United States Constitution, although it is not explicitly mentioned nor expressly guaranteed in the Constitution or Bill of Rights.

STATEMENT OF THE CASE

A. Factual Background

In 1956 the State of Mississippi enacted laws creating the Mississippi State Sovereignty Commission (the "Commission"). The stated legislative purpose was to protect the "sovereignty" of the State of Mississippi from perceived federal encroachment. However, the Commission was in actuality Mississippi's secret intelligence service, committed to the perpetuation of racial segregation by spying on and seeking to intimate persons engaged in desegration and civil rights activities.

The Commission and its agents engaged in widespread and illegal surveillance, spying and warrantless searches of the persons and property of citizens. The principal goal of this illegal surveillance was to aid the state in maintaining its policies of racial segregation by collecting intimate information on the lives of persons who were, or were suspected of being, involved in desegregation efforts, and to use this personal information for the purpose of discrediting and harassing those citizens who opposed the state's policies of racial segregation.

Significantly, however, the illegal collection of information included surveillance on or about persons who were merely friends or associates of the main targets. These persons would now have no reason to know or support that their names even appear in the files.

Over a period of about 15 years, large amounts of information was collected, cataloged and stored. Some of this information came from public sources, such as newspaper articles. However, a large part of the information consisted of surveillance notes, interview notes and other products of illegal "spying" activities. Commission files contain numerous reports (often unsubstantiated or false) of homosexuality, adultery, child molestation, sexual promiscuity, illegitimate births, financial improprieties and alleged drug abuse. These files and records were secretly maintained by the Commission. Their existence came to public notice only after the Commission had ceased its illegal surveillance and related activities.

In 1977, the Mississippi legislature voted to disband the Commission, and directed that all records and files accumulated by the Commission be destroyed. However, before this directive could be implemented, the Plaintiffs, filed suit in 1977 and obtained an order enjoining destruction of the files. Thereafter, the Mississippi legislature enacted legislation sealing the files until the year 2027.

The Petitioner here, Edwin King, is a Plaintiff and a class member. The Petitioner seeks disclosure of the files but only in a manner which protects and safeguards the constitutional privacy rights of persons who are identified in the files. In 1987, the District Court established a subclass consisting of those persons who seek disclosure of the files but, at the same time, seek to protect the privacy rights of individuals who were referred to in the files. The District Court therefore subdivided the Plaintiffs into: (1) the "access plaintiffs", composed of persons whose members seek unlimited public access to the records of the Commission, represented by the ACLU, et al, and (2) the "privacy plaintiffs" whose members seek access to the records for those named in the records, but who advocate the protection of privacy rights and no further access by other parties without the consent of each person or persons described in the particular record. This privacy subclass is represented by the Petitioner.

B. The Proceedings Below

In ACLU v. Mabus, 719 F.Supp. 1345 (S.D.Miss. 1989) the District Court, over the objections of the subclass of "privacy plaintiffs", held that all files and records compiled by the Commission should be opened for full public inspection with no safeguards to protect the constitutional privacy rights of those persons who were subject to the illegal surveillance and warrantless searches. The "privacy plaintiffs" sought review in the Fifth Circuit.

In ACLU v. Mississippi, 911 F.2d 1066 (5th Cir. 1990), the Fifth Circuit vacated the Order of the District Court that all Commission files be disclosed to the general public and held at 1068:

> The privacy plaintiffs have not requested, and we do not recommend, that the Commission's files remain entirely inaccessible to the public. We hold today only that on the record before us, complete and unfettered disclosure of the files does not give appropriate protection to the constitutional privacy interests of various persons in not having government-gathered sensitive personal information about them released.

The Fifth Circuit found that the complete disclosure ordered by the District Court would be a violation of individual constitutional privacy rights. Therefore, the Court of Appeals remanded the case to the District Court to devise a plan for releasing the files to the public while protecting individual privacy rights.

Upon remand, the District Court found that many documents contained in the files are already in circulation, that the public has a right to know what is contained in the Commission files, and that the Commission files should be presumptively open. The District Court placed the burden of rebutting the presumption that the files should be opened and freely disseminated upon the "privacy plaintiffs" and other persons whose names appear in the files. The District Court also noted that the Fifth Circuit referred to the possibility of redacting names from previously unpublished material, but found that the redaction of the names in any given file would not necessarily protect privacy interests because the individuals may also be named in previously published materials.

The District Court divided persons identified in the files named into

two categories: (1) "Victims" and (2) "State Actors", a designation which includes "informants." The District Court held that Victims have a right to confidentiality and should have "input" concerning the future opening of their files or files which contain their names. A person is to be placed in the victim category if he or she was subject to investigation, surveillance, intrusions, or the dissemination of false or misleading information by the Commission. State Actors have no such rights because they were responsible for violating the constitutional rights of the victims. The District Court held that a State Actor, who has no privacy rights, should be defined as a member, employee or informant, (paid or otherwise), of the Commission and any person who requested information from the Commission.

The District Court ordered the Mississippi Department of Archives and History ("MDAH") to compile a list of all names in the files and classify each of the persons as either a Victim or a State Actor. MDAH is required to make the list available to the litigants who will have a right to review the list and file challenges to the status of any person. The District Court also held that persons classified as State Actors may challenge their status, and held that any files which have been challenged will remain sealed until the challenge is resolved in a later, undescribed judicial proceeding.

The District Court concluded that in order for persons to know whether their names are contained in the Commission files, they must have some sort of notice, and held that the privacy rights of the individuals mentioned in the files would be violated again if information about these victims is disseminated without their knowledge. However, the District Court found that public notice alone is sufficient to protect the privacy rights of these individuals from possible violation by disseminating the information without their knowledge.

The District Court also ruled that the MDAH will be required to publish notices in national and state newspapers and that such publication would sufficiently notify those who may have been victims of unlawful commission activities as to their rights. Most important, the Court placed the burden on the Victims and State Actors to then respond to the public notice and make a written request (1) to determine whether his name appears in the files and, if so, (2) to ask for a copy of such files. After reviewing the files, the responding victim may make various requests including a request that his name be redacted from the file. The

District Court held that, the burden should be on the individual to respond to the public notices. If no response is received, inaction will be treated as a waiver of that person's privacy interest.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit found that the Commission reports include numerous (often unsubstantiated or false) allegations of homosexuality, child molestation, illegitimate births, sexual promiscuity, as well as reports of financial improprieties, drug abuse, and extreme political and religious views. American Civil Liberties Union of Mississippi, Inc. v. Mississippi, 911 F.2d 1066, 1070 (5th Cir. 1990).

The United States Constitution does not explicitly mention or expressly guarantee a right of personal privacy. However, the Supreme Court has declared that the right of privacy is a fundamental right guaranteed by the Constitution. See, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). The Supreme Court has likewise held that, except in very limited circumstances, the right to be free from unwarranted governmental intrusions into personal privacy is a fundamental constitutional right. Stanley v. Georgia, 394 U.S. 557 (1969).

The protected "zone of privacy" recognized by prior opinions of the Supreme Court includes both the right of the individual to be free in his private affairs from governmental surveillance and intrusion and the right of the individual not to have his private affairs made public by the government. Each citizen has a constitutionally protected interest in avoiding or preventing disclosure of personal matters without specific consent. In Whalen v. Roe, 429 U.S. 589, 605-06 (1977), the Supreme Court specifically recognized the constitutional right of individuals to prohibit the government from disclosing or disseminating sensitive personal information:

> ...the threat to privacy implicit in the accumulation of vast amounts of personal information in . . . massive government files ... the right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwanted disclosures...

The right of the citizen to be free from unwarranted and unnecessary

government disclosure of private facts has been recognized. Ramie v. City of Hedwig Village, 765 F.2d 490 (5th Cir. 1985). Similarly, courts have held that the disclosure of personal information should only be allowed where the government demonstrates a legitimate and compelling state interest which is found to outweigh the threat to the individual's privacy interest. See, Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981).

Congress has also recognized a constitutional right of privacy for each citizen. Congress has imposed upon government the statutory duty to avoid unwarranted disclosures of personal information where such disclosure would constitute a violation of constitutionally protected privacy rights. For example, the Privacy Act of 1974, 5 U.S.C. §552(a), expressly recognizes that the right of privacy is a personal and fundamental right protected by the Constitution for the benefit of every citizen. The Privacy Act of 1974 was therefore intended by Congress to safeguard personal privacy by generally prohibiting a federal agency from disclosing records relating to any citizen without his consent.

The Freedom of Information Reform Act of 1986 ("FOIA"), 5 U.S.C. §552, mandates full disclosure of records and files by federal agencies. However, FOIA specifically exempts from disclosure personnel, medical, or similar files and documents where such disclosure would constitute an unwarranted invasion of personal property. See, 5 U.S.C. §552(b)(6). Records and information compiled for law enforcement purposes may also be exempted from disclosure where such records could reasonably be expected to constitute an unwarranted invasion of personal property. 5 U.S.C. §552(b)(7)(C).

The interest of the citizen in avoiding disclosure by the government of sensitive personal matters discussed in Whalen v. Roe, supra, was reaffirmed in Nixon v. Administrator of General Services, 433 U.S. 425 (1977). More recently, in Church of Scientology v. United States, 506 U.S. 9 (1992), the Supreme Court again affirmed the interest of the individual citizen in maintaining and protecting the privacy of his personal affairs and held that such an expectation was of sufficient importance to merit constitutional protection.

The Supreme Court also recently considered the right of an individual citizen to continue to protect his privacy even though some personal information may be available to the public or in the public domain. In Department of Defense v. Federal Labor Relations Authority,

510 U.S. 487 (1994), the Supreme Court held that an individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because some of that information may be already available to the public.

The District Court failed to recognize that public release of private information illegally obtained may magnify the harmful effects of the unconstitutional acts. However, the "Privacy Plaintiffs" have never suggested that the commission files should remain closed. They only ask that the Court protect the constitutional privacy of the individuals named in the files by not having the State illegally gather sensitive personal information, and then release it to the public without sufficient safeguards. The Privacy Plaintiffs believe and urge that the constitutional right of privacy requires that each named individual be contacted by more than a "public notice" and allowed to assert a privacy right to include having the file sealed or having their name redacted.

This is similar to the policy enunciated by the federal government that no agency should disclose records except pursuant to a written request by or with the prior consent of the individual to whom the record pertains. If an individual wishes to have the file information released, he may say so. However, the responsibility of obtaining the prior consent of each individual should be on the person seeking disclosure of the files. The burden should not be placed on the individual to "rebut" the presumption that the files should be opened.

The Court below failed to consider the announced federal public policy reflected in the Freedom of Information Act, 5 U.S.C. §552 ("FOIA") which provides for public release of documents only after deletion or redaction of exempted information, including privacy information. While the FOIA does not directly control, the District Court and the Court of Appeals should have considered and been guided by the announced public policy of FOIA to protect information regarding personal privacy from disclosure. FOIA provides, in part, that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempted..." 5 U.S.C. §552(b). Thus, a federal agency providing records obtained or generated by the government, whether legally or illegally, may delete or redact exempted portions including names of individuals where such records or information "could reasonably be expected to constituted an unwarranted evasion of personal privacy." 5

U.S.C. §552(7)(C).

The information contained in these files should never have been gathered in the first place and should only be disclosed when a "legitimate state interest" has been found which clearly outweighs the threat to the Plaintiff's personal privacy interest. The District Court, therefore, abused its discretion and erred when it held that the files should be presumptively open and placed the burden of rebutting this presumption upon the person whose privacy rights were illegally violated. Clearly, no legitimate state interest has been or can be demonstrated by releasing the outrageous files and reports which specifically name, for example, college students who are alleged (without any substantiation) to have used or sold felony drugs, or by releasing the equally damaging reports regarding the names of alleged homosexuals or alleged sexual partners of persons who were the subject of the illegal investigations.

Many of these persons were not involved in the civil rights movement or in desegregation efforts in Mississippi and therefore would have no reason whatsoever to know or suspect that their names appeared in files illegally maintained by the Commission. None of these persons would have any motivation whatsoever to respond to a "public notice" because they would never suspect that their names appeared in the files in the first place.

Moreover, there was no credible proof that it would be too expensive, burdensome, or difficult to locate these individuals by current driver license information or last known address and to give them adequate notice that their names appeared in the illegal files, and to request redaction or other relief before the files were released to the general public. The Court erred when it concluded that these files should be presumptively open. There was no proof that any of the files referred to above had in fact been released or that the state had any legitimate interest in the release of these files which would overcome the individual privacy rights.

CONCLUSION

The plan and procedure adopted by the District Court violates the constitutional privacy rights of individuals, and does not provide an adequate means and method for providing notice to persons whose

names appear in these files. The Court erred when it concluded that the files should be presumptively open. There is no legitimate state interest in these files which overcomes the constitutional right to privacy. This action should be remanded to the District Court with further instructions that individual notice should be given, if possible, to any person identified in the files and that persons name should be redacted or the file should remain closed unless he or she specifically consents to opening the file.

DATED: September 6,1996.

Respectfully submitted,

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APPENDIX A

AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, INC. et al., Plaintiffs – Appellees/Cross Appellants,
v.
Edwin KING, Plaintiff – Appellant / Cross Appellee,
v.
Kirk FORDICE, Governor, et al., Defendants – Appellees.

No. 94-60425.

United States Court of Appeals, Fifth Circuit.

June 11, 1996.

Appeal from the United States District Court for the Southern District of Mississippi.

Before WISDOM, EMILIO M. GARZA and PARKER, Circuit Judges.

PER CURIAM:

In *ACLU v. Mississippi*, 911 F.2d 1066, 1069 (5th Cir. 1990) we remanded this case to the district court to devise a remedy that accommodates the constitutional privacy interests of the plaintiff class. We affirm, finding that the district did not abuse its discretion in adopting the plan now under review.

FACTS AND PROCEDURAL HISTORY

The Mississippi State Sovereignty Commission ("Commission") gathered personal information about Mississippi citizens from 1957 to 1977, with the purpose of thwarting desegregation and other civil rights work. The Commission records included information, some of which was not true, about individuals' preferences and activities, financial dealings, political and religious beliefs and affiliations, and drug and

alcohol use. The information was disseminated by the Commission to law enforcement agencies, employers, and others prior to 1977.

When the Mississippi legislature disbanded the Commission in 1977, it directed that all of its records be destroyed. The federal district court granted the plaintiff class in an injunction forbidding the destruction of the files. In response, the legislature sealed the files until 2027. In 1987, the plaintiff class was subdivided into "disclosure plaintiffs" whose ought unlimited disclosure of Commission files to the general public and "privacy Plaintiffs" who did not want public access to the records without prior permission of those named in the record or without notice to those persons. The district court then enjoined the enforcement of the statute sealing the files, ordering that all Commission files be disclosed and accessible to the general public. This Court vacated that order, holding that complete and unfettered disclosure of the files does not give appropriate protection to the constitutional privacy interest of persons in not having government-gathered sensitive personal information about them released, *ACLU v. Mississippi*, 911 F.2d 1066, 1069 (5th Cir. 1990), and remanded to the district court to devise a plan that accommodates those interests. *Id.* at 1075.

THE DISTRICT COURT ORDER NOW UNDER REVIEW

On remand, the district court found that "as a practical matter, many of the documents from the files are already in circulation," and held that the public has a "right to know" what is contained in the Commission files, and therefore that the "Commission files should be presumptively open." The district court noted that this Court had referred to the possibility of redacting names from previously unpublished material but concluded that such a solution was not viable. The redaction of names in any given file will "not necessarily" protect the privacy interest of those individuals because they may also be named in previously published materials, which are cross indexed in the files.

As part of the procedure designed to protect privacy, the

district court divided persons named in the files into two categories: (1) victims, who were subjected to investigation or surveillance and (2) state actors. State actors, defined as member, employee or informant of the Commission or any person who requested in formation from the Commission during its existence, have no privacy rights under the district court order. The district court ordered the Mississippi Department of Archives and History ("MDAH") to list and classify all the persons named in the documents not already in circulation as victims or state actors. Any person classified as a "state actor" can challenge that status, and any person classified as a "victim" can challenge the opening of a file containing references to them. Files involved in such a challenge will remain sealed until the challenge is resolved by a later, undescribed judicial proceeding.

The district court further ordered MDAH to publish notices in national and state newspapers and held that such publication "will sufficiently notify those who may have been victims of unlawful Commission activities as to their rights as set forth in this opinion. Any person can respond to the public notice and request whether his name appears in the files and if so, ask for a copy of such files. The responding person may make various requests including requesting that his name be redacted from the file. If MDAH receives no response, this inaction will be treated as a waiver of that person's privacy interest.

REMEDY NOT AN ABUSE OF DISCRETION

[1] We remanded this case, leaving "the district court broad discretion to fashion a remedy[.]" *ACLU*, 911 F.2d at 1074. We now review that remedy for abuse of discretion.

Plaintiff Edwin King, representing the privacy plaintiffs, contents on appeal that the district court erred in holding that the files are "presumptively open," in failing to order that victims' names be redacted unless the victims give actual consent to release, and in prescribing inadequate notice.

We find that the district court's findings of facts are not clearly

erroneous, *see ACLU v. Mississippi*, 911 F.2d at 1069, and that the remedy devised, while necessarily imperfect, was not an abuse of discretion.

CROSS APPEAL

[2] American Civil Liberties Union of Mississippi, Inc., Cross Appellants, ask this Court to modify the district court's order in three particulars: (1) the archivists' determinations in indexing the documents should not be granted deference by the courts; (2) no class of documents should remain permanently sealed; (3) the right of victims to insert rebuttal materials should not be cut off.

Disclosure plaintiffs ask that this Court "fine tune" the district court's order to clarify that the archivists' determinations should be reviewed *de novo* by the court and that no class of documents should remain permanently sealed. These two issues require interpretation of the language of the order. This task is best left to the continued oversight of the district court, which anticipated disputes and provided for their resolution.

[3] Finally, the time limit for victims to provide rebuttal should be a reasonable balance between the interest in allowing rebuttal and the interest in avoiding making the process unduly burdensome. We are not willing to find that the plan provision regarding rebuttal time is an abuse of discretion. However, it is a close question. We therefore invite the district court to reconsider the plan in this respect with a view toward providing more time to file rebuttals.

CONCLUSION

For the foregoing reasons, we affirm the district court's order.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, ET AL.

VS

KIRK FORDICE, ET AL.

PLAINTIFFS

CIVIL ACTION NO. J77-0047B

DEFENDANTS

MEMORANDUM OPINION AND ORDER

This cause is before the Court on remand from the United States Court of Appeals for the Fifth Circuit for this Court to devise a remedy for opening the files of the now defunct State Sovereignty Commission ("the Commission") while balancing the competing interests of the "privacy Plaintiffs" and the "access Plaintiffs." Having considered the opinion of the Fifth Circuit and the supporting and opposing memoranda of all parties to this action, the Court finds that the files should be opened in accordance with the procedure set forth below.

I. Background

A. Procedural History and ACLU I

The detailed facts of this case are set forth in the previous opinion of this Court, American Civil Liberties Union v. Mabus, 719 F. Supp. 1345 (S.D. Miss. 1989) ("ACLU I"), and will not be repeated at great length in this opinion. A brief summary of the facts and procedural history is necessary and relevant to the current issues before the Court. The Commission was created in 1956 as an agency of the State of Mississippi ostensibly "to protect the sovereignty of the State of

Mississippi, and her sister states, from encroachment thereon by the Federal Government. . ." Miss. Code Ann. § 3-1-11 (1972). The understood purpose of the Commission, however, was to maintain racial segregation in the South despite orders to the contrary by the United States Supreme Court.[1] As the secret intelligence arm of the State, the Commission engaged in a wide variety of unlawful activity, thereby depriving the Plaintiffs of their constitutional rights to free speech and association, to personal privacy and to lawful search and seizure. The Commission also deprived Plaintiffs of rights protected by the statutes of the United States.

> Deprivations were accomplished through unlawful investigations and through intentional actions designed to harass and stigmatize individuals and organizations engaged in speech and conduct protected by the United States Constitution. The targets of Commission activity were designated by members and agents of the Commission. There is no record that a search warrant or any other judicial sanction of Commission acts was either sought or received. The avowed intent of the Commission and its co-conspirators was to chill or preclude the Plaintiffs from speech, assembly, association, and the petition of government.

ACLU I, 719 F. Supp. at 1353.

In 1977, the Mississippi legislature voted to disband the Commission and directed that all Commission records be destroyed. The Plaintiffs in this action obtained an order prohibiting such destruction. The legislature reacted by enacting laws sealing the files until the year 2027. See Miss. Code Ann. § 39-5-61 (1972).

After the vacation of an earlier denial of class certification by the judge to whom this case was originally assigned, this Court certified the Plaintiff class as

> all natural persons, all not-for-profit associations and all unincorporated associations who, in or around the State of Mississippi, have been or continue to be subject to investigation,

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[1] See Brown v. Board of Education, 347 U.S. 483 (1954); 349 U.S. 294 (1956).

> surveillance, intrusions or the dissemination of false and misleading information by agencies of the State of Mississippi or those acting in concert with said agencies.

ACLU I, 719 F. Supp. at 1351-52. In 1987, the Court subdivided the class "to assure its adequate representation." Id. at 1352. The subclasses include (1) the "access Plaintiffs," composed of persons whose members seek unlimited public access to the records of the Commission, and (2) the "privacy Plaintiffs," whose members seek access to the records for those named in the records, but who advocate no further access by other parties without the prior consent of each person or persons described in a particular record.

In ACLU I, this Court entered an Order which, inter alia, enjoined the State from enforcing the Mississippi statute which makes it a felony to release any information contained in the files, see Miss. Code Ann. § 39-5-63 (1972), and required the State to maintain the Commission files as any other public record according to state and federal law.[2] Id. at 1363; see also American Civil Liberties Union v. State of Mississippi, 911 F.2d 1066, 1068, reh'g en banc denied, 919 F.2d 735 (5th Cir. 1990) ("ACLU II").

This Court attempted to balance the equities in ACLU I concluding that:

> To open the files would further the general principle of informed discussion of the actions of government, while to leave the files closed would perpetuate the attempt of the State to escape accountability. Opening the files would also end public speculation as to the extent of the acts of the Commission, much of which has far exceeded the record.

719 F. Supp. at 1362. Recognizing the interests of the privacy Plaintiffs, the Court also ordered the Defendants in this matter to accept any rebuttal submitted by a class member regarding an allegation, charge or other information contained in the files concerning that class member,

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[2] This Order effectively enjoined the State from enforcing Miss. Code Ann. § 39-5-61 (1972) which provides that the files will be kept under seal until the year 2027.

such rebuttal to become a part of the files to be indexed and cross-referenced accordingly. Id. at 1363.

B. ACLU II

The issue on appeal in ACLU II was the order of this Court that "all Commission files be disclosed and accessible to the general public." ACLU II, 911 F.2d at 1068. The Fifth Circuit vacated the opinion of this Court in ACLU I holding as follows:

> The privacy plaintiffs have not requested, and we do not recommend, that the Commission's files remain entirely inaccessible to the public. We hold today only that on the record before us, complete and unfettered disclosure of the files does not give appropriate protection to the constitutional privacy interests of various persons in not having government-gathered sensitive personal information about them released.

ACLU II, 911 F.2d at 1066. The court reasoned that the privacy Plaintiffs have an interest in restricting the disclosure of information which must be balanced against the competing interest of the access Plaintiffs. Id. at 1070. The court described the competing interests of the various Plaintiffs in this action:

> [W]e note first that because the public concern in this case is bringing to the public's attention the various activities of the Commission, the disclosure of a particular name would rarely, if ever, be necessary to enumerate and demonstrate the Commission's divers[e] dealings; the actual names of the Commission's victim's are much less a matter for public concern. . . . [T]he instant case concerns whether a court must order that (often unlawfully obtained) information in possession of the state must be released in its entirety even where, to the extent that that information is a matter of public concern, any public need to know could be satisfied by release of the information in a more limited format.

Id. at 1071. The court discounted the concerns of the access Plaintiffs and the Defendants regarding the cost of a limited disclosure system, concluding that because approximately three- ourths of the material in

the Commission files has already been published, only about one-fourth of the material need be subject to access restrictions. Id. at 1074 n.8.

C. Procedural History Since ACLU II

Several status conferences have been held and resulting Orders issued since the Fifth Circuit mandate on November 16, 1990. On March 12, 1991, the Court entered an Order granting access to the files to (1) personnel with the Mississippi Department of Archives and History ("MDAH") for the purpose of cataloguing the records, and (2) parties to this suit. In that Order, the Court required anyone seeking to view the documents to sign a confidentiality Oath, under penalty of contempt of court, acknowledging that any information contained in the Commission documents could not be communicated to third parties.[3] Subsequent Orders indicate that MDAH has inventoried the contents of the Commission files, including which documents in the files are published documents. Much of the delay up to this point has been to allow MDAH to prepare an extensive index of the Commission files. An evidentiary hearing was held on September 20 and 21, 1993, and testimony was received concerning recommended procedures which might be used to open the Commission files as well as various practical problems which will exist. After this hearing, all parties submitted post-hearing briefs concerning suggested solutions for balancing the competing interests involved in this action.

II. Analysis

A. Files Shall Be Presumptively Open

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[3]The substance of the Oath is as follows:

I understand and agree that I can be given access to the Sovereignty Commission Files only upon the stipulation that, unless future orders allow further dissemination, the documents and information which I examine or which are provided me cannot be communicated or disseminated in any fashion except to persons who are also bound by this oath so that those individuals will also be prohibited from making any further disclosures.

Many notable events have occurred since the opinion of this Court in ACLU I. Several newspaper articles were published in the major statewide daily newspaper, The Clarion Ledger, stating that the Commission had conducted jury research of the persons composing the juries in the first two murder trials of white supremacist Byron de la Beckwith.[4] These articles, combined with other fac- tors, prompted the District Attorney for the Seventh Circuit Court District to reopen the case and try Beckwith for a third time.[5]

On September 21, 1993, the Court conducted a portion of the hearing in chambers due to issues which arose during the testimony of Erle Johnston, former Director of the Sovereignty Commission from April 1, 1963, until July 1, 1968. During the hearing in chambers, Johnston testified that he had obtained copies of Sovereignty Commission documents from the office of Dixon Pyles, counsel for the privacy Plaintiffs. According to Johnston, he was in Pyles office one day when some boxes were delivered. Pyles told Johnston that the boxes contained Sovereignty Commission documents. Later, Johnston returned to Pyles' office to ask if he could copy the documents. Pyles was not in, but his secretary gave Johnston permission to remove the files from the office and have copies made. These copies were then given by Johnston to Sid Salter, Publisher of the Scott County Times, whose syndicated weekly column appears statewide. These files have since been produced to the Court and are currently under seal.[6] Salter wrote several columns about the Commission files, and apparently shared portions thereof, with other journalists.[7] It is unclear from the the hearing in this matter whether the articles which appeared in The Clarion Ledger concerning

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[4]Beckwith was accused of murdering civil rights leader Medgar Evers.

[5]The Court notes that in the third trial, some thirty years after the offense, Beckwith was convicted for the murder of Medgar Evers.

[6]Salter had given these documents to the Mississippi State University Library, under seal, to be opened ten years after Salter's death.

[7]According to an Affidavit from Leesha Lee Faulkner, former journalist with The Clarion Ledger, a source gave the newspaper several loose-leaf binders of copied documents from the Commission files. According to Faulkner, that source was Sid Salter.

the Beckwith juries were written by journalists who had access to the files given to Salter by Johnston.

Finally, the Court notes that an extensive collection of documents, known as the Paul B. Johnson papers, is housed at the University of Southern Mississippi. Many of these documents are duplicates of documents in the Commission files. The Johnson papers are available to the public for research purposes. All of the above instances of disclosure reinforce the propositions that (1) the public has a right to know what is contained in the Commission files, and (2) as a practical matter, many of the documents from the files are already in circulation.

The Court therefore finds that the Commission files should be presumptively open. The procedures for rebutting this presumption will be outlined below. During the hearing in this matter, testimony was given that when similar files were noticed to be opened in other jurisdictions, there was little interest in such files. The Court believes that, after an initial flurry of articles by the media, there will be a similar lack of interest by the general public in the files which are the subject of this case. Commission files will be presumptively open, but the privacy Plaintiffs will have an opportunity to request that their individual files be redacted or remain sealed.

The Fifth Circuit has mandated that this Court devise a plan to open the files which will accommodate the interests of the privacy Plaintiffs in restricting the disclosure of information and the interests of the access Plaintiffs who wish to have the files completely open. ACLU II, 911

[4]The privacy Plaintiffs have taken a different position since the remand of this case asserting that there should be no distinction between state actors and victims and that each person named in the files should be contacted concerning whether that person wishes to open his or her file. At one point, the privacy Plaintiffs also; argued that this Court should seal all Commission files, including the Paul B. Johnson files located at the University of Southern Mississippi. Because these positions were apparent not asserted on appeal (these issues are not mentioned in this context in ACLU II), the Court will not address them on remand. The Court notes, however, that it only has jurisdiction over the Commission files which are currently held by MDAH. Furthermore, it would serve no useful purpose for this Court to close files, such as the Johnson files at the University of Southern Mississippi, which have been in the public domain for years.

F.2d at 1070. As noted in ACLU II, the privacy Plaintiffs "do not propose to conceal any of the unlawful acts perpetrated by the government, but merely to redact names or disguise the identities of those victims of such governmental improprieties." Id. at 1074. The Fifth Circuit also noted that the privacy Plaintiffs are not seeking to "prevent parties that are lawfully in possession of the information, and wish to disclose it, from doing so." Id. at 1072.[8] With these considerations in mind, the Court must devise a mechanism for opening the files while protecting the interests in confidentiality of the privacy Plaintiffs.

The Fifth Circuit in ACLU II suggested that only one-fourth of the materials need be subject to any access restrictions because approximately three-fourths of the material has already been published. ACLU II, 911 r.2d at 1074 n.8. The court also mentioned, for demonstration purposes only, the possibility of redacting all names from the previously unpublished materials in the files. Id. at 1075 7 n.9. After receiving evidence at the hearing in this matter, specifically the testimony of several archivists, the Court finds that the solution mentioned by the Fifth Circuit is not viable. The archivists testified that most of the files are comprised of published materials as well as unpublished materials. The archivists advised against removing previously published documents from their places in the original files and stressed to the Court the value of maintaining all materials in sequential order. The Court finds that the original arrangement of the files has historical value in and or itself. Therefore, simple redaction of all the names in the materials in any given file will not necessarily protect the privacy interests of those individuals. See infra at 17-18. The remedy set forth in this opinion attempts to accomplish the goal of maintaining the original integrity of the files, while balancing the competing interests of the various Plaintiffs in privacy and disclosure.

B. Status of Those Persons Named in the Files

Privacy Plaintiffs who are named in the files have a right to confidentiality and should be able to have input concerning the opening of their files. State actors, however, have no such rights with regard to

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[8]This definition is taken from the Plaintiff class definition as certified by this Court on August 18, 1982. See ACLU I, 719 F. Supp. at 1351-52.

Commission files because those persons were responsible for violating the constitutional rights of the victims. The victim category is hereby defined as any person who was subject to investigation, surveillance, intrusions or the dissemination of false and misleading information by the Sovereignty Commission of the State of Mississippi or those acting in conjunction with that agency.[9] The state actor category is hereby defined as any member, employee or informant (paid or otherwise) of the Commission and any person who requested information from the Commission during its existence. The state actor category does not include persons employed by the State, such as a State legislator, unless that person was affiliated with the Commission in the manner described above or requested information from the Commission during its existence.

MDAH is the logical agency which should initially determine the status of persons named in the Commission files. As part of an indexing process, MDAH should make a list of all names in the files and classify each of those persons as either a victim or a state actor. This classification shall be completed and made available to the litigants within one year of the date of this order. This system will not be perfect, and the Court recognizes that problems may arise. For example, a person may be categorized as a victim in one part of the files and a state actor in another portion. Whether such persons, who may be classified in both categories, have waived any privacy rights by acting in conjunction with the Commission may be determined at a later date.[10] The litigants in this action shall have a right to review the list compiled by MDAH and the material in the files pertaining to the individuals listed for the purpose of

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[10] If during this process MDAH discovers numerous persons who were both victims and state actors, MDAH should notify the Court and an appropriate procedure for classifying these persons will be devised by the Court.

[11] When reviewing this list and materials, the litigants will be bound by their previously signed confidentiality Oaths and will remain subject to the contempt powers of this Court. Furthermore, this list and materials are for administrative purposes only and shall not be disclosed to the general public.

[12] Because the Court does not know, at this time, how many challenges, if any, will be made regarding the status of persons in the files, the Court will not devise a procedure at this time for handling such challenges.

deciding whether any challenges will be made concerning the status of any given person on the list.[11] Persons classified as state actors may also, as a part of this process, challenge the status which has been assigned them by MDAH.[12] The litigants in this action may also file an objection to the position taken by a person objecting to his or her state actor status. Presumably there will be no status challenges by persons classified as victims of Commission activity. Any files which have been challenged will remain sealed until the challenge is resolved.

The court has found that individuals whose names appear in the Commission files should be classified as either state actors or victims. The Court finds that there should be no separate category for public figures. Defendants have asserted that the Court should adopt the definition of public figure set forth in Gertz v. Welch, 418 U.S. 323, 351-52 (1974), that there must be "clear evidence of general fame or notoriety in the community" in order for a person to be considered a public figure. Because this Court has previously found that the actions of the Commission were unconstitutional and unlawful, all persons who were subject to such unlawful activity are entitled to have their privacy interests protected. Even if a person was a public figure, that does not entitle others, especially the State, to engage in unlawful activity concerning that person and disseminate such information simply because the person is well-known in the public domain.

The access Plaintiffs have asserted that any dead persons whose names appear in the files should have no privacy rights because an action for defamation dies with the person. Defendants, to the contrary, argue that a person's right to privacy does not end at death. Even though a person's right to sue for defamation may end at death, that person's constitutional right to privacy is a separate and independent right:

> [T]he mere fact that the release of information in the files may give some persons grounds on which to sue for defamation does not preclude individuals from exercising other protections against the material's publication; moreover, defamation is not only a nonexclusive but also an under inclusive remedy. . . . Therefore, a cause for defamation supplements, rather than supplants, the individuals' constitutional privacy rights.

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[12]The Court recognizes that MDAH has no way of knowing whether some persons are deceased. In obvious cases, for example a file on Medgar Evers, the

ACLU II, 911 E.2d at 1070 n.4. Assuming without deciding that privacy rights continue after death, the Court, in balancing the interests involved in this action, finds that the files of deceased persons should be open to the public The right of the public to know about the unlawful activities of its government must be considered and should be weighted more heavily in cases of deceased victims, who can suffer no embarrassment, than in cases where the victim is still living. The files of deceased persons will therefore be open to the public as soon as the imaging and indexing process is complete.[13]

C. Procedure for Dealing with Requests

MDAH will be charged with copying and indexing the files so that it can respond to inquiries from individuals concerning whether their names appear in the files. [14] MDAH must be able to determine whether the inquiring person is named in the files and whether that person is a victim or a state actor. MDAH must also be able to provide a copy of his or her file to the inquiring person. At the hearing in this matter and in the post-hearing briefs, the Court was presented with three alternatives

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file should be opened. In other cases, when no response is received from that person, the files will be opened just as any other files for which no response has been received.

[14]The procedures set forth in this opinion will preempt the procedures set forth in the Mississippi Public Records Act of 1983, Miss. Code Ann. § 26-61-1 et seq. That Act will not be applicable to the Commission files which are the subject of this case because of the nature of the interests involved and the specificity of the procedures set forth in this opinion concerning the opening of the Commission files.

[15] The Court has been informed that this system is computerized and will be able to store materials word for word. Defendants describe the system as being similar to a copying machine because documents will be fed through an imager, and a copy will be produced into the computer. These documents may then be retrieved in accordance with an indexing system, and the equipment will reproduce copies in their original appearance. Using the equipment, the MDAH will have the ability to redact names and other identifying information.

from the Defendants concerning the most efficient way to copy and index the Commission files. Defendants have asserted that the most cost-effective method of dealing with the documents in the Commission files is by using a computer imaging system.[15] The Court offers no opinion concerning whether this system or some other system should be used. This is a matter for the Defendants to decide, so long as the system chosen will allow the Defendants to comply with the orders of this Court. The system chosen by the Defendants must permit MDAH to have a bank of information readily available which will serve two purposes: (1) permit MDAH to respond to inquiries during the notice period; and (2) allow the Commission files to be opened to the public in an accessible form at a later date while preserving the integrity of the original documents.[16]

The Court must also be concerned with the privacy rights of other individuals regarding responses to inquiries about Commission files. Due to these competing privacy interests, any documents which are sent to a person inquiring about his or her file during the inquiry period must have all names of victims, who have responded to the notice, redacted from such documents.[17]

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[16] The archivists who testified at the hearing in this matter were concerned with maintaining the files as they are currently arranged. They testified and the Court has found that original ar rangement has historical value in and or itself. The computer imaging system proposed by the Defendants should alleviate these concerns because that system will allow persons to view the docu- ments and/or copy them without disturbing the originals. Furthermore, the documents can be imaged and maintained in the same order as such documents appear in the files. Also, names can be redacted to preserve the privacy interests where necessary.

[17] The complete procedure for responding to inquiries will be detailed further in this opinion. MDAH will be required to hold all inquiries until the end of the inquiry period. Then, at the end of this period if no inquiries are received from certain individuals, then those persons' names need not be redacted from material which is sent to those who have made inquiries.

The Court is aware that some files contain documents which are already in the public domain, such as excerpts from books and newspaper articles. The Court recognizes that even if a name is redacted from a newspaper article, any researcher could obtain a copy of the article from other sources and determine the identity of the individual whose name has been redacted from the article. By balancing the competing interests in this case, the Court is aware that no set of persons will be in complete agreement with the plan devised by this Court. As noted by the Fifth Circuit in ACLU II, "no system of disclosure will be perfect." 911 F.2d at 1075. Regarding documents which are in the public domain, if a file contains only material which has already been made public, the Court finds that such files should remain completely open and unredacted.[18] If the file contains anything other than public material, however, the file will be subject to the redaction process or to closure, depending upon the victim's request.[19]

It has been noted that the Fifth Circuit in ACLU II recognized that approximately three-fourths of the files are comprised of newspaper clippings or other published materials. These published materials in many instances are placed in the files with related unpublished materials. The archivists have stated that the historical value of the files depends in part upon maintaining the sequential integrity of the files. Accordingly, if an individual requests that his name be redacted from the file pertaining

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[18] Defendants have asserted that it is not necessary to scan all documents contained in the files because documents in the public domain are readily available from other sources. As noted in the text of this opinion, files containing both public and private documents are subject to the redaction process. Therefore, public documents in such files must be in the computer system, if that is the system the Defendants choose to use. If a file contains only material which is already in the public domain, the Court has no objection to citations to such material, if Defendants also state in that citation where such material may be located. If the material is not readily available, such as at a local public library, then MDAH must make such material available on the computer system.

[19] The Court notes that a request for name redaction would require MDAH to redact the name of the individual from all Commission files, not just from a file about that individual.

to him; if that file contains both published and unpublished documents; and if his name is redacted from the unpublished documents but not redacted from the published documents, the individual would receive no real protection. If under the same set of circumstances his name were redacted from both the published and unpublished documents, he would still receive no protection since a researcher could go to the original published source and obtain his name. The Court therefore finds that in some individual circumstances, a person's file should be sealed completely, rather than simply having that person's name redacted from the file. If an individual requests that his or her file be closed, some sort of adjudication will be necessary at that point to balance the privacy rights of that individual against the right of the public to know what is in the file. The procedure for challenging such closure will be similar to the procedure for challenging the status of an individual named in the files. The individual will request complete closure, at which point the litigants in this action will have a right to review that individual's file. Some sort of hearing will then be necessary to balance the competing interests in the matter. Furthermore, any files for which complete closure has been requested will remain sealed until any challenges to such closure are resolved.

Several options are available, therefore, to persons who are named in the Commission files. First, the person may simply not respond to the notice given by the Defendants, in which case that person's file shall be opened. The burden is on the individual to respond to the public notices. If no response is received, this inaction will be treated as a waiver of that person's privacy interest. Second, the person may respond to the notice, ask whether his name appears in the files, and if so, ask for a copy of such files. The responding victim then has several options: (1) request that his file remain open; (2) request that his name be redacted from the file; (3) request that any identifying characteristics be redacted from the

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20 As noted previously in this opinion, if the file contains only public material, it will be open to the public.

21 Any supplementation to the Commission files will be subject to privacy requests from other individuals.

22 These options are not necessarily mutually exclusive. For example, a responding victim may choose to supplement his file and have his name redacted from the file.

file; (4) request that his file be sealed;[20] (5) request to supplement the file with additional information;[21] or (6) challenge the status which he has been assigned by MDAH.[22] If an individual challenges his state actor status or requests the complete closure of his file, such files will remain sealed until the status or closure issues are resolved. If a file is supplemented, MDAH must send such supplementations to persons requesting information if that person's name appears in the supplemented information. If after requesting and being provided with copies of documents from the files, the inquiring person does not further respond to MDAH within 30 days, that individual will be deemed to have waived his privacy interest.

D. Notice

In order for persons to know whether their names are contained in the Commission files, they must have some sort of notice.

Defendants assert that the nature of the relief to be granted is prospective in nature and thus barred by the Eleventh Amendment to the United States Constitution.[23] The Court finds that the relief granted in this case does not violate the Eleventh Amendment because that amendment does not bar "prospective injunctive relief to prevent a continuing violation of Federal law." Green v. Mansour, 474 U.S. 64, 68 (1985) (citing Ex parte Young, 209 U.S. 123, 155-56, 159 (1908)). The Green Court concluded that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." Id. (citing Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 102 (1984)).

The Court finds that so long as the Commission files remain completely sealed, there is a continuing violation of the federal constitutional rights of those named in the files. The Fifth Circuit noted

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[23]The Court notes that in ACLU I, this Court ordered that "the named Defendants and their successors in office are charged with serving notice of this Order to class members. Such notice is to be effective but not overly burdensome and may be by commercial publication. " 719 F. Supp. at 1363. This portion of ACLU I was apparently not addressed on appeal, and arguably should not be addressed on remand. The Court, however, in an abundance of caution, will address the issue of Eleventh Amendment immunity.

in ACLU II that "'[t]he disclosure strand of the privacy interest in turn includes the right to be free from the government dicslosing private facts about its citizens and from the government inquiring into matters in which it does not have a legitimate and proper concern.'" ACLU II, 911 F.2d at 1069-70 (quoting Ramey v. City of Hedwig Village, 765 F.2d 490, 492 (5th Cir. 1985), cert. denied, 474 U.S. 1062 (1986)). Here, the rights of the victims of Commission activity were violated initially when the Commission investigated them without any legitimate purpose. Those rights would be violated again if information about these victims is disseminated without their knowledge. Therefore, the notice relief which this Court is granting will remedy the initial constitutional violation and prevent future violations of the victims' privacy rights in confidentiality.

The Commission was in existence from 1956-1977, although it was not funded during the last four years of its existence. See ACLU I, 719 F. Supp. at 1349. During this period, many persons who were not native Mississippians came into this state to support the civil rights movement and to help blacks register to vote. The Commission files contain many references to these individuals. To protect the rights of those named in the files who no longer reside in Mississippi and to protect the rights of those remaining in this State, the Court finds that notice must be given on a national and statewide basis.

To accomplish the national notice, the Court hereby directs the Defendants to place advertisements in USA Today, The Wall Street Journal and The New York Times which will sufficiently notify those who may have been victims of unlawful Commission activities as to their rights as set forth in this opinion. These advertisements must be at least one-eighth of a page and must run once each week for two consecutive weeks. [24] The Court directs the parties this action to

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[24]Defendants have submitted a sample advertisement in their response to this Court. See Defendants' Response at 11. The Court makes no finding concerning the sufficiency of this advertisement.

[25]The prices presented to and obtained by the Court are as follows: (1) USA Today - National, Friday - $13,984; 1/8 page legal notice in other than classified section - $9,649; (2) The Wall Street Journal - 1/8 page, weekday - $16,715; (3) The New York Times - 1/8 page, weekday - $8,026.

collaborate to compose an advertisement which will be approved by all the parties involved. The Court also directs the parties to confer regarding on which dates the advertisement should be placed in the various papers. The Defendants have presented the Court with some prices for national advertisements, and the Court has obtained further prices.[25] While these prices are expensive, they are not too onerous a burden for the State to bear for notifying possible victims of illegal Commission activity. The Court will not require that advertisements be placed on national television. As noted by the Defendants, this case is expected will report the story, including information concerning how the Commission files will be opened.

Regarding notice to victims in this state, the Court finds that the same advertisement should be placed in the twelve daily newspapers published in the state, once each week for two consecutive weeks. The Court will not require advertisements to be placed with local televised news media because the story is expected to be reported by such media.

E. Time Frame

The Court has considered the arguments of the Defendants concerning the time frame for opening the files. The Defendants have requested eighteen months during which to scan and index the Commission files. The Court, however, finds that the files can be indexed and opened to the public in a shorter period of time than that advocated by the Defendants. The Court will allow one year from the date of this opinion for the Defendants to do whatever is necessary to prepare and index the files so that MDAH can respond to inquiries from persons concerning whether their names appear in the files.[26] During the scanning and indexing process, MDAH should classify persons in the files as either state actors or victims and provide this list to the litigants in this action at least by the end of the twelve month period.

[26]As noted previously, the Court understands that the process will be accomplished through a computer imaging system.

[27]If the case is appealed and no opinion is forthcoming from the Fifth Circuit within one year, the remaining time frame set forth in this opinion regarding notice by advertisement and responding to such notice shall begin from the date of the opinion from the Fifth Circuit.

The Court expects this case to be appealed, once again, after the entry of this Order. Because the files must be scanned and indexed at some point, the Court directs that this process take place during the pendency of any appeal which might be taken. The Court will not grant a stay to the Defendants pending appeal, and will expect the scanning and indexing process to be completed within twelve months of the date of this opinion.[27]

After this twelve month period expires the advertisements to give notice to potential victims of Commission activity must be completed within forty-five days of the expiration of the initial twelve month period. Any disputes concerning the content of the advertisements must therefore be resolved during the initial twelve month period, so that the advertisements may run on time. From the date of the last advertisement, potential victims will have ninety days to respond to MDAH concerning whether their names appear in the files. This period will encompass any requests postmarked within the ninety-day period. Defendants have proposed a system of sending a form to those requesting information, requiring them to complete the form and return it to MDAH.[28] Such forms could request pertinent information from the individual such as name, nickname, any other identifying characteristics that might identify that person in the file and other such pertinent information. Upon receiving an inquiry by phone or in writing, MDAH should send the standardized form to the inquiring individual within five working days of receiving the inquiry. The inquiring party must return this form

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28 MDAH must administratively comply with the order of this Court. The Court assumes that MDAH will maintain records concerning inquiries and responses, both by the MDAH and by the inquirers. The Court also assumes that MDAH will devise forms not only for requesting information but also for responding and that MDAH may wish to include information on these forms concerning certain directives of the Court contained in this and/or other orders. The Court will not require its pre-approval of any such forms or other information sent to inquirers. However, such material should be submitted for comment to the Plaintiffs. If disputes arise, they may be presented to the Court.

postmarked within 15 calendar days of its mailing by MDAH. The notice advertisement must be specific in notifying potential victims of the time frame for responding to the notice and for complying with the procedure for receiving and returning the standardized form.

At the end of the initial ninety day inquiry period, MDAH will have ninety days to respond to requests for materials. MDAH should wait until the end of the initial inquiry period before responding to requests so that it may properly redact the names of parties who have requested information. Thus, MDAH should redact the names of all persons from whom it receives a request for information, before sending out any materials to those who have submitted inquiries. As noted previously, the files for which no response is received shall be opened to the public. Furthermore, any names of persons which appear in the files of another should not be redacted if that person has submitted no response to the notice placed by the Defendants. After MDAH sends materials to parties which have submitted requests, those parties will have thirty days from the date the materials are mailed by MDAH to notify MDAH of their decision concerning whether they wish their files to remain open, to be closed, to have their names redacted, to contest their assigned status or to submit any rebuttal information.[29]

After MDAH has received all the notifications from persons who have requested their files concerning whether those files should remain open or closed, MDAH will have thirty days in which to finally prepare the files for public disclosure. At the end of this period, the files shall be opened to the public. Therefore, approximately eight months from the date the advertisements are placed in the various newspapers, the Commission files shall be open to the public. If there are disputes concerning the status of a person named in the files, or other similar disputes, the files which are the subject of dispute will remain closed until such disputes are resolved by the Court.

Below is a short summation of the time frames set forth in this

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[29]The postmarks on the notifications returned to the MDAH shall be determinative of compliance with the thirty period. Complete failure to respond or an untimely response shall constitute a waiver of the inquirer's privacy rights. See also supra note 28 regarding MDAH administrative procedures.

opinion for accomplishing the goal of opening the Commission files. The time shall begin from the date of this opinion.

1. 12 months	MDAH to prepare files, assign status to each individual, prepare advertisement with help of all parties.
2. 45 days later	Advertisement to be completed.
3. 90 days after last advertisement	Inquiries from individuals about the files must be postmarked within this time. MDAH should mail forms within 5 days of receiving requests. Inquirers must return form within 15 days of mailing by MDAH.
4. 90 days from close of inquiry period	MDAH to respond to all inquiries by providing requested information.
5. 30 days from date material is mailed by MDAH	Response due from inquirers; if no response, privacy interests waived. Postmark of response will be determinative of timeliness.
6. 30 days from receipt of last response	Files will be opened to the public except for contested files.

III. Conclusion

The Court having weighed the competing interests of the privacy Plaintiffs, the access Plaintiffs and the expense to the Defendants in this matter finds that the files of the Sovereignty Commission should be opened in accordance with the instructions set forth in this Memorandum Opinion and Order. The previous Order of this Court in ACLU I declaring Miss. Code Ann. § 39-5-G3 (1972) unconstitutional, and enjoining the State of Mississippi from enforcing that statute, is still in effect as that finding of this Court was not disturbed on appeal in ACLU II. The Court also finds that Miss. Code Ann. § 39-5-G1 (1972), which would have allowed the files to be opened in 2027, is also unconstitutional because if an individual is entitled to privacy in 1994,

he would be entitled to that same right of privacy in 2027. Thus, any files sealed by the procedures set forth in this proceeding shall remain permanently sealed.

IT IS THEREFORE ORDERED that the Defendants in this case shall comply with the instructions of this Court regarding the opening of the Sovereignty Commission files as set forth in detail in this Memorandum Opinion and Order.

IT IS FURTHER ORDERED that Miss. Code Ann. § 39-5-61 (1972) is hereby declared to be unconstitutional and the State of Mississippi is permanently enjoined from enforcing that statute.

SO ORDERED this the 31st day of May, 1994.

/s/ William H. Barbour, Jr. CHIEF JUDGE

(2)

Supreme Court, U.S.
FILED
OCT 15 1996
CLERK

No. 96-379

In The

Supreme Court of the United States

October Term, 1996

EDWIN KING, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, INC. ET AL. AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

v.

KIRK FORDICE, GOVERNOR, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF THE ACLU/MS, DELTA MINISTRY, RIMS BARBER, KEN LAWRENCE, OWEN BROOKS, ET AL.

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BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's judgment in this case. That opinion is reported at 84 F.3d 784 (5th Cir. 1996).

OPINIONS BELOW

In 1981, the Fifth Circuit rejected Mississippi's argument that privilege could serve as a basis for keeping its Sovereignty Commission files under seal. *American Civil Liberties Union of Mississippi, Inc. v. Finch, et al.*, 638 F.2d 1336 (5th Cir. 1981). After a consent decree prohibited surveillance of and interference with First Amendment activities (R. 1914), the District Court, in 1989, ruled unconstitutional the state statute[1] which had made it a crime to know the contents of the Sovereignty Commission files. *American Civil Liberties Union of Mississippi, Inc., Delta Ministry, Owen Brooks, and Ken Lawrence, on Behalf of Themselves and a Class of Others v. Ray Mabus, as Governor of the State of Mississippi, et al.*, 719 F. Supp. 1345 (S.D. Miss. 1989). That portion of the decision was not appealed. The District Court also ruled that the Sovereignty Commission files, as state agency records, were subject to the Mississippi open records law[2] with regard to issues of privacy or disclosure. The 1990 Fifth Circuit

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[1] Section 39-5-63, Miss. Code Ann. (Supp. 1972).

[2] Mississippi Public Records Act of 1983, Miss. Code Ann. § 25-61-1 *et seq.*

opinion, *American Civil Liberties Union, Inc. v. State of Mississippi v. King*, 911 F.2d 1066 (5th Cir. 1990) remanded for consideration of notice to class members and privacy interests. The District Court's findings and remedy on remand, unreported, were approved by the Fifth Circuit, saying "We find that the district court's findings of facts are not clearly erroneous, *see ACLU v. Mississippi*, 911 F.2d at 1069, and that the remedy devised, while necessarily imperfect, was not an abuse of discretion." *American Civil Liberties Union of Mississippi, Inc., et al., v. King v. Fordice*, 84 F.3d 784, 787 (5th Cir. 1996).

STATEMENT OF THE CASE

Decades of surveillance and intrusion by the Mississippi State Sovereignty Commission have been reduced, for purposes of this review, to six filing cabinets worth of papers, of which roughly three-quarters are old newspaper articles. *American Civil Liberties Union, Inc. v. State of Mississippi v. King*, 911 F.2d 1066, 1074 n.8 (5th Cir. 1990).

Prior to allowing public access to these documents, the District Court ordered notice to be given in national and local newspapers, in order to inform persons who might wish to assert privacy interests in information about themselves. Victims of the Commission's activities who are named within the files can then require that materials related to them remain sealed. The relief also provides that persons surveilled may, if they wish to, place a rebuttal in the files in order to clear their names. The particulars of the form of notice, the method of validating the accuracy of identities, the proceedings to

be held to settle disputes of identity, or disputes as to status as state agent or victim, or contests among persons named on the same page as to revealing the contents of that document, and other administrative details, were left still to be fashioned by the parties and the Court, as the issues became ripe.

The factual findings supporting the manner of notice chosen by the Court were not contested by counter propositions offered by petitioners. At trial, the petitioners, the "privacy" subclass, did not present any testimony, (T., Vol. II, p. 150, Vol. II, pp. 249, 294), and did not introduce any documentary evidence. (T., Vol. II, p. 250).

The District Court found as fact a number of matters that underlay the remedial order. The Court found that large quantities of the sealed files were already available to the public.[3] The petitioners in this appeal do not contest the District Court's findings that many, if not most, of the Sovereignty Commission documents may be available from other public sources.

The District Court found that leaks to the press of sealed materials from the files preceded the appearance of articles relating to Sovereignty Commission materials

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[3] A mass of Sovereignty Commission documents are publicly available at the University of Southern Mississippi through the papers of former governor Paul B. Johnson. (R. 2709) There are other documents still publicly accessible, as testimony showed, from materials circulated by the Sovereignty Commission as part of its intended purpose to use information and misinformation to shape public opinion in opposition to the civil rights movement and maintain segregation. (*E.g.*, T. Vol. II, p. 235-249) (Exh. AP-10, T. Vol. II, p. 238).

in the most widely circulated newspaper in Mississippi, *The Clarion-Ledger,* which articles were conducive to the reopening of the Medgar Evers murder prosecution. (R. 2707-2709) The Court found that the full meaning of the files' contents cannot be evaluated without a knowledge of external facts and circumstances, information that is not contained within the files themselves. Because the informational value of a document might be apparent only to the person affected by it, the Court chose to lodge the initial determination of whether the file contained private information which should remain sealed in the persons affected, themselves.

The District Court found that files similarly opened in other jurisdictions sparked little interest. (R. 2709) It found that merely redacting the names was unworkable as a solution to privacy, because the format of storage and indexing the original files was itself of historic importance. Since catalogued reports naming individuals were in files with newspaper clippings corresponding to the same events, the redacted names could be identified by mere reference to the newspaper articles. (R. 2711).

Notice to those individuals affected was found to be achievable by means of newspaper announcements. (R. 2722) The District Court found that national publication of such notice was necessary because many of the people surveilled, during Freedom Summer for example, were then young college students from out of state who would not be likely to obtain notice if publication were limited to the State of Mississippi. (R. 2722) The district judge further found that national coverage of the opening of the Sovereignty Commission files was likely to occur since that event would be newsworthy in and of itself, leading

to wire stories and media coverage from other than print journalists. (R. 2723) Direct contact with victims drawn on a model of service of process was rejected by the District Court based on its factual assessment that efforts to locate persons from addresses or names they might not have used for forty years was simply not realistic.

The petitioners appear not to challenge these factual findings by the District Court. Neither have the petitioners suggested, either by testimony or by brief, how more effective notification might be obtained. Their objections that notice provisions are insufficient are without factual foundation. As the Fifth Circuit Court of Appeals has already observed, the remedy in this action cannot be perfect. In weighing the options, the District Court found that the interest in setting forth a remedy within a meaningful time was also an important consideration and outweighed the reasons to seek perfect notice, which might perpetually delay the opening of the files.

REASONS FOR DENYING THE WRIT

I. THE RULING BELOW WAS NOT AN ABUSE OF DISCRETION.

The standard of review for the fashioning of an equitable remedy is well established. The remedy devised is within the sound discretion of the district judge. *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 28-29 (1971).

The District Court's order was issued after an evidentiary hearing in which all of the litigants were afforded an

opportunity to present evidence regarding appropriate remedies. The District Judge, who has been presiding over this litigation for 13 years, carefully weighed the competing interests of revealing the Commission's misdeeds and protecting the privacy of its victims. He crafted a remedy which provides a method for the protection of the privacy interests of the victims. The Fifth Circuit Court of Appeals, which has reviewed this case three times, concluded that the remedy ordered by the district judge was within the bounds of his discretion and tailored to the facts and circumstances of this case. Accordingly, further review by this Court is neither necessary nor appropriate. The District Judge's remedial order is constrained in scope and does not overreach, as prohibited in *Missouri v. Jenkins*, 515 U.S. ___, 115 S.Ct. 2038, ___ L.Ed.2d ___ (1995).

II. THE PETITIONERS HAVE FAILED TO STATE ANY REASON WHY THIS COURT SHOULD CONSIDER THIS CASE.

None of the cases cited by the petitioners concerns how to afford notice to persons who have suffered injury, but who do not know that their injury was caused by State agents working through the Sovereignty Commission.

The ruling below comports with *Nixon v. General Services Administration*, 433 U.S. 425 (1977), to protect the "American people's ability to reconstruct and come to terms with their history", "the desire to restore public confidence in our political processes by preserving the materials as a source facilitating a full airing of the

events" and the "need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation," *Id.* at 453. It also parallels the public policy announcement of *Department of Justice v. Reporters' Comm. for Free Press,* 489 U.S. 749 (1989)[4] that openness serves the core purpose of contributing significantly to public understanding of the Government's operations or activities.

The petitioners have failed to advance a sound reason why this Court should consider the question that they contend is raised by the decisions below. They allege no conflict among the circuit courts and no departure from this Court's decisions by the circuit court or the district court in their resolution of the issues presented by this case. The petitioners do not ask this Court to overrule any of its own precedents, nor will the Court's consideration of the issue presented here be likely to generate a rule of broad applicability. It is, hopefully, not a recurring issue.

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[4] Cited with approval in *United States Department of Defense v. Federal Labor Relations Authority,* 510 U.S. 487 (1994) relied upon at page 10 of the Petition for Certiorari.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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